Filed 4/15/03 P. v. Barr CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. NATHAN BARR et al., Defendants and Appellants.	C039544 (Super. Ct. No. 99F01530) MODIFICATION OF OPINION AND DENIAL OF REHEARING

THE COURT:

It is ordered that the opinion filed herein on March 19, 2003, be modified as follows:

On pages 26-27, part VI of the Discussion is to be omitted and replaced with the following:

VI

In Camera Review of Sealed Medical Records

Jones subpoenaed mental health records and medical records of witness Charla Barnes allegedly maintained by the UC Davis

Medical Center. Jones was seeking evidence of Barnes's mental capacity in an attempt to impeach her testimony.

The return indicated there were no medical records or mental health records. However, medical records were eventually forwarded to the trial court. In agreement with counsel, the court conducted an in camera review of the medical records to determine if they reflected any psychiatric or psychological issues that could assist the defense. The court announced the records contained nothing of the sort.

Jones now asks us to review the sealed medical records independently to determine if the trial court abused its discretion in making its decision. The People do not oppose our reviewing the records. Unfortunately, the sealed medical records are not included in the appellate record before us.

On January 31, 2002, we granted Jones's request to augment the record on appeal to include Barnes's medical records. We instructed that any sealed materials were to be delivered to us under seal with no copies provided to counsel.

By letter dated March 18, 2002, we informed the parties the augmented record had been filed, and we listed the documents we had received. Our listing of the augmented record did *not* include any reference to receiving the medical records or any records under seal. We instructed counsel "to immediately proceed in accordance with rule 35(e) of the California Rules of Court" if there was a discrepancy in the augmented record.

Jones did proceed to file a notice under rule 35(e), but he did not include any reference to the medical records in his

notice. Instead, he sought to correct the inadvertent omission of other documents from the augmented record. We ultimately responded to Jones's rule 35(e) notice on April 22, 2002, and the matter proceeded to briefing with no further action by Jones to correct or augment the record further.

Jones argues he assumed the sealed medical records had been transferred to this court, and that our notices of March 18 and April 22 reflected solely what was also transmitted to both counsel. Jones's assumption was incorrect. Our notice informed him exactly what we had received and instructed him how to remedy any discrepancy. The burden was on Jones to ensure we had an adequate record, but his attorney failed to take the necessary steps to meet this burden.

Alternatively, Jones argues his attorney's failure to ensure compliance with our augment order constituted ineffective assistance of counsel. We disagree.

Again, to establish constitutionally inadequate representation, a defendant must demonstrate "counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Samayoa* (1997) 15 Cal.4th 795, 845; see *Strickland v. Washington, supra,* 466 U.S. at p. 694 [80 L.Ed.2d at p. 698].)

If the defendant fails to establish the prejudice component, the reviewing court need not determine whether counsel's performance was deficient. (See *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1712.)

Jones suffered no prejudice from his appellate counsel's error. Jones confessed to stabbing Randall once in the neck and twice in the torso. He said he decided to do it because Randall owed him money. He admitted he took drugs and other belongings from Randall after the murder. There is thus no reasonable probability the result would have been more favorable to him but for his attorney's failings.

This modification does not affect the judgment.

The petition for rehearing is denied.

THE COURT:

BLEASE, Acting P.J.

NICHOLSON, J.

ROBIE, J.